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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Reexamination of the Policy)
Statement on Comparative)
Broadcast Hearings)

GC Docket No. 92-52

RM-7739

RM-7740

RM-7741

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TO: The Commission

**Comments of the National Association
of Broadcasters on the Second
Further Notice of Proposed Rulemaking**

The National Association of Broadcasters ("NAB")¹ submits these comments in response to the Commission's *Second Further Notice of Proposed Rulemaking*, released June 22, 1994.² This request for comments — the third in this proceeding — was issued by the Commission following the decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). In light of the *Bechtel* court's comprehensive critique of the Commission's comparative criteria, it does not appear the FCC can construct a meaningful comparative hearing process which will withstand judicial scrutiny. In light of this, NAB urges the FCC to again reexamine its comparative renewal process and institute a two step renewal process.

¹ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's broadcasting industry.

² 59 Fed. Reg. 32945 (June 27, 1994).

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New Comparative Criteria Are Not Likely To Meet the *Bechtel* Standard

The questions propounded in the *Second Further Notice* suggest that the Commission is limiting its focus to developing new criteria in place of the integration factor invalidated in *Bechtel*. NAB believes that this inquiry will be unavailing. In earlier comments, NAB did urge the Commission to retain comparative hearings to select licensees for new facilities, but asked it to change the criteria it would use. Comments of the National Association of Broadcasters, GC Docket No. 92-52 (June 2, 1992). In light of *Bechtel*, however, it does not appear that any acceptable comparative criteria could be developed. Indeed, in its earlier comments, NAB proposed that the Commission abandon the integration and diversification factors that formed the basis of most comparisons under the 1965 *Policy Statement*.³ NAB argued that both the integration and diversification criteria rested on assumptions that the best broadcast service would be rendered by an owner who is directly involved in station management, but who also has no other broadcast interests, assumptions that were not only unproved, but also at odds with other and better-reasoned regulatory policies. Further, NAB pointed out that the integration policy in particular tended to generate oddly structured applications apparently designed for the sole purpose of obtaining an integration preference, sometimes without any intention of implementing the proposal if the application were granted. *See, e.g., Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 704 (D.C. Cir. 1975)(denying rehearing *en banc*).

The *Bechtel* opinion amplified these criticisms of the integration policy. The court held that the absence of any permanent commitment to maintaining an integrated ownership structure left the policy without any rational support. It further concluded that the Commission had no

³ *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

factual basis for its conclusion that stations with ownership integrated into management would be operated better than stations without such integration, and that the Commission's "predictive judgment" that this was so was irrational. It also pointed out that the integration factor lead to "strange and unnatural" ownership arrangements.⁴

The problems the court identified with the integration factor are equally applicable to the other primary comparative criterion — diversification of ownership. In the same way that any benefits from the integration credit could be defeated by an early transfer of a station, a licensee who obtained its license on the basis of a lack of ownership of other broadcast facilities may sell to a group owner after only one year of operation.⁵

Even more significantly, the Commission also lacks evidence to support its intuitive conclusion that a licensee with no other broadcast interests will provide better program service than one who owns other stations. Indeed, the Commission reached the opposite conclusion when it revised its radio ownership rules, holding that "greater consolidation could increase the variety of programming available to the public, including local news and public affairs programming." *Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755, 2766, *recon.*, 7 FCC

⁴ 10 F.3d at 886, *quoting Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992).

⁵ As the court noted in *Bechtel*, 10 F.3d at 879-80, imposing a mandatory holding period, as the Commission proposed in response to *Bechtel I*, does not solve this problem. *Reexamination of the Policy Statement on Comparative Hearings (Further Notice of Proposed Rulemaking)*, 8 FCC Rcd. 5475 (1993). Even if a licensee chosen to advance diversity would be required to hold its station for three years, that would still be an inadequate basis on which to prefer that applicant over another which proposed operations with more lasting benefits. Further, as the court noted, there are significant public interest arguments against reimposition of any mandatory holding period. 10 F.3d at 880; *see* Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking, GC Docket No. 92-52 (filed Oct. 13, 1993); Reply Comments of the National Association of Broadcasters on the Further Notice of Proposed Rulemaking, GC Docket No. 92-52 (filed Oct. 28, 1993).

Rcd. 6387 (1992). Further, the diversification factor also may lead to “strange and unnatural” ownership proposals, under which those with the most significant financial interest in an applicant might accept only non-voting stock in order to claim a preference based on the lack of other broadcast interests of the remaining stockholders. As with integration, such arrangements do not advance the Commission’s reasons for the diversification policy.

Thus, the Commission is not likely to be able to sustain on further review either of the two factors primarily used under the *1965 Policy Statement* to select broadcast licensees.⁶ Any similar structural criteria that the Commission could adopt would be subject to the same critiques. Thus, the Commission should not expend efforts attempting to recreate what the *Bechtel* court destroyed.

While in its earlier comments, NAB suggested that the Commission should adopt new criteria focusing on likely indicators of superior broadcast performance, it now seems that these criteria would be subject to many of the same criticisms as the traditional structural factors. First, were the Commission to specify certain indicators of likely superior performance as comparative criteria,⁷ it would have to also commit itself to ensuring that licensees kept their commitments in actual station operation. The Commission has for a long period tended to avoid engaging in such “promise v. performance” review of stations, and it does not appear that the regulatory benefits from creating a new regulatory structure would be worth the costs. In the absence of such

⁶ This does not mean that the Commission would be foreclosed from adopting policies to encourage the diverse ownership of broadcast facilities. It only means that a structural diversification factor in comparative hearings is not likely to be sustainable.

⁷ Examples of possible performance-based factors might include superior business plans, commitments to public service activities, commitments to certain categories of programming, or superior technical proposals.

enforcement, however, performance-based criteria would suffer from the same lack of assurance that any public benefits will be sustained as did the integration factor.

Performance-based criteria also are particularly subject to being adopted for the sole purpose of winning a hearing. It is all too easy for an applicant desiring a facility to make elaborate programming or other commitments which would not, viewed alone, be economically appropriate. If the Commission's selection criteria have the effect of inducing stations to operate in an economically inefficient manner, they are not likely to serve the goal of encouraging the development of vibrant, efficient broadcasting service.

Therefore, we can conceive of no other comparative criteria that can be substituted for the integration factor that would permit the Commission to continue selecting licensees through its traditional comparative hearing process.

The Commission Should Adopt a Separate Two-Step Procedure for Broadcast Renewal Applications

The Commission has a long-pending inquiry into the procedures and standards to be employed in connection with applications for renewal of broadcast licenses. *Broadcast Renewal Applicants*, 4 FCC Rcd. 4780 (1989). As it moves to adopt new selection processes for applicants for new broadcast facilities, the Commission must also consider how it will handle renewal applications.

The use in a renewal context of the same non-comparative selection criteria that the Commission may adopt for new applications would lead to irrational results. The Commission and the court of appeals recognize that renewal applicants which demonstrate a good record of service to their communities deserve to have a strong renewal expectancy. *See Central Florida Enterprises v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). If

renewal applications are evaluated using the same criteria as applicants for new facilities, the Commission must either graft a separate renewal standard onto those criteria, or else lose the public interest benefits which come from promoting stability of ownership and investment in broadcast facilities that are enhanced by the establishment of a renewal expectancy.

Rather than forcing consideration of renewal applications into the same mold conceived for the very different situation when there is no incumbent licensee, the Commission should establish a separate renewal process. As with the procedures the Commission recently adopted for applications for renewal of cellular telephone licenses, this should be a two-step process, under which competing applications will only be accepted if the renewal applicant is not found to merit a renewal expectancy. *License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 8 FCC Rcd. 2834, *recon. denied*, 8 FCC Rcd. 6288 (1983) [hereinafter *Cellular Renewals*].

The public interest factors that the Commission identified as supporting the use of a two-step renewal process in the cellular service apply equally to applications for renewal of broadcast licenses. In *Cellular Renewals*, the Commission identified three objectives which would be advanced by a two-step renewal process:

“(1) to encourage investment in cellular facilities; (2) to avoid the risk of replacing an acceptable service provider with an inferior one, based on unproven promises; and (3) to avoid disruption of cellular radio service.”

Id. at 2836. The Commission concluded that if a licensee can demonstrate substantial performance during its license term, the avoidance of a comparative hearing “creates a favorable environment for investment and financing.” *Id.* at 2836-37. Similarly, if broadcast licensees are assured that, having provided substantial service during their license term, they will be granted a renewal,

they will also be encouraged to make long-term investments in new facilities and services.⁸

Lengthy comparative hearings are particularly harmful to this objective since licensees have little reason to make substantial investments while their right to operate a station is under question.

Second, the Commission can evaluate a renewal applicant based on an actual record of broadcast service. No matter what criteria are adopted for new applicants, the Commission will be limited to an evaluation of promises made by applicants about what they plan to do, promises that often are tailored to meet the Commission's standards. Unless the incumbent has not provided substantial service, in which case no renewal expectancy should be granted, the Commission can have little reason to believe that any other applicant it selects will actually provide better broadcast service than the incumbent, and the new licensee may be worse. As the Commission noted in the cellular context, conducting a lengthy and expensive hearing merely to replace one licensee with another of similar quality would do nothing to advance the public interest. *Id.* at 2837.

Like cellular service, it also serves the public interest to avoid disruption in broadcast service. Incumbent licensees and their staffs often have deep knowledge of their communities and established connections with local public service organizations. A new licensee may have none of this background, and service to the public may suffer during a transition from one licensee to another. Indeed, broadcast service may be entirely disrupted if the existing licensee cannot continue in service until the time a new station is ready to begin operation. The Commission found in

⁸ For television stations in particular, the need for a stable investment climate will become increasingly important as the Commission moves towards the establishment of Advanced Television Service, requiring major capital investments by television stations. *See, e.g., Advanced Television Systems (Third Report and Order/Third Further Notice of Proposed Rulemaking)*, 7 FCC Rcd. 6924 (1992); *Advanced Television Systems (Second Report and Order)*, 7 FCC Rcd. 3340 (1992).

dealing with cellular renewals that, having established the existence of a renewal expectancy as the most significant question concerning a renewal application, it made little sense to permit comparative consideration of applications until the Commission determined whether the incumbent is entitled to the renewal expectancy. *Id.* A two-step process in which competing applications are not accepted unless the incumbent does not receive a renewal expectancy reduces the burden on the Commission's resources from having to conduct extensive hearings, and avoids imposing on potential applicants the costs of preparing and prosecuting applications unless it is likely that renewal will not be granted.

As the Commission held in *Cellular Renewals*, the decision in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), does not bar it from adopting a two-step renewal process. 8 FCC Rcd. at 2838-39. To be sure, the Commission there distinguished broadcast applications, noting that one of the reasons the *Citizens* court rejected a two-step process was the fact that it prevented the Commission from using the renewal process to advance the goal of increasing diversity of broadcast ownership. As demonstrated above, however, the *Bechtel* analysis effectively precludes the Commission from basing licensing decisions on diversification. Thus, the reason proffered by the Commission for distinguishing cellular from broadcast renewals no longer applies.

There are other grounds as well for concluding that *Citizens* does not bar the Commission from adopting a two-step broadcast license renewal process. Much of the court's opinion reviews the court's efforts to prevent the Commission from granting any preference to renewal applicants. *See* 447 F.2d at 107-10. It seems clear that the court viewed the two-step process as a *sub rosa* means of conferring such a preference. Since *Central Florida*, however, the court has approved the Commission's award of a controlling renewal expectancy. Whether that preference is granted

in the context of a comparative hearing or otherwise does not appear to be a matter for significant dispute.⁹

Under the policy statement rejected in *Citizens*, the Commission planned to accept competing applications before considering the renewal application, with the expectation that the competing applications would be dismissed if the renewal applicant were found to have provided substantial service. The court found that this process violated both the guarantee of a “full hearing” in Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), and the doctrine of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The process which NAB proposes, however is different: a window for filing competing applications would not be opened unless the Commission determined that a renewal applicant was not entitled to a renewal expectancy.

As the Commission recognized in *Cellular Renewals*, 8 FCC Rcd. at 2838-39, more recent decisions have recognized the Commission’s authority to establish standards for applications which have the effect of preventing the filing of competing applications. See *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989). The court has also interpreted *Ashbacker* as applying only to a situation where two mutually exclusive applications “are simultaneously pending before the Commission.” *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 438 (D.C. Cir. 1991). *Ashbacker* permits the Commission to arrange its acceptance of applications so that competing applications will not be permitted until the Commission has considered a renewal applicant’s entitlement to a renewal expectancy. Until a competing application is filed, the right to a comparative hearing guaranteed by *Ashbacker* does not attach.

⁹ Of course, while competing applications would not be accepted before the Commission addressed a renewal application, petitions to deny the renewal would be available for members of the public to raise concerns about the renewal applicant.


Conclusion

For the foregoing reasons, the Commission should separate renewal proceedings from comparisons among applications for new broadcast facilities, and follow the model it developed for cellular renewal applications, permitting only consideration of the renewal application until the Commission determines whether to award a renewal expectancy.

Respectfully submitted,

NATIONAL ASSOCIATION
OF BROADCASTERS

1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430


Henry L. Baumann
Jack N. Goodman

Counsel

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